91-1872

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FEIST PUBLICATIONS, INC.,
Petitioner

v.

RURAL TELEPHONE SERVICE COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

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SPEARVILLE NEWS, INC. 316/385-2200

QUESTION PRESENTED

Under Section 2 of the Sherman Act: Is additional proof of specific harm to competition required where it has been shown that a monopolist in one market has injured a competitor in another market by refusing to deal with that competitor with the intent to exclude and without a valid business justification and has thereby acquired and maintained monopoly power in the second market?

LIST OF PARTIES AND RULE 29.1 LIST

There are no parties to this proceeding not revealed by the caption.

Feist Publications, Inc. has no parent company. Feist Publications, Inc. owns 79 percent of Feist Management, Inc. There are no other subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Feist Publications, Inc., respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above entitled proceeding on February 19, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 957 F.2d 765 (10th Cir 1992). It is reprinted in the appendix hereto, p.1a, *infra.*

The opinion of the United States District Court for the District of Kansas is reported at 737 F.Supp. 610 (D. Kan.1990), and is reprinted in the appendix hereto, p. 7a, *infra.*

The opinion on motion for reconsideration of the United States District Court for the District of Kansas is not reported. It is reprinted in the appendix hereto, p. 31a, *infra.*

JURISDICTION

On February 19, 1992, the United States Court of Appeals for the Tenth Circuit entered its opinion reversing the determination of the District Court. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 USC §1254(1).

STATUTE INVOLVED

The statute involved is 15 USC §2:

> § 2. Monopolization; penalty
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Rural Telephone Service Company, Inc. ("Rural") is a certified public utility granted monopoly status to provide telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages.

Feist Publications, Inc. ("Feist") is a publishing company that specializes in area-wide telephone directories. Unlike a typical directory which covers only a particular calling area, Feist's area-wide directories cover a much larger geographical range, reducing the need to call directory assistance or consult multiple directories. The Feist directory that is the subject of this litigation covers eleven different telephone service areas in fifteen counties in northwest Kansas. Like Rural's directory, Feist's is distributed free of charge and includes both white pages and yellow pages. Feist and Rural compete vigorously for yellow pages advertising.

The success of any telephone directory is dependent on advertisers and potential advertisers perceiving that the directory is used by consumers to whom it is distributed. Consumer usage depends to an important extent on the accuracy, completeness and timeliness of the information contained in the white pages of the directory. An accurate and complete telephone directory intended for consumer use must contain up to date white page listings of all residences and businesses in the area served by the directory. Directories containing only yellow pages have not been successful. White page listings

information becomes increasingly inaccurate over time—30 to 35 percent change each year. This is the reason directories are published at least annually.

As the sole provider of telephone service in its service area, Rural obtains subscriber information quite easily in the ordinary course of its telephone monopoly business. Persons desiring telephone service must apply to Rural and provide their names and addresses; Rural then assigns them a telephone number. Feist is not a telephone company, let alone one with monopoly status, and therefore, lacks independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the telephone companies operating in northwest Kansas and offered to pay for the right to use its white pages listings.

Of the eleven telephone company service areas, only Rural refused to license its listings to Feist. Rural's refusal created a problem for Feist as omitting these listings would have left a gaping hole in its area-wide directory, rendering it less attractive to potential yellow pages advertisers.

Without a license, Feist's only alternative was to utilize the older published Rural directory as a source of listing information and update from it. Even so Feist's directory was still only 70 percent complete in the Rural service area.

When Rural discovered Feist was using its older published directory Rural sued Feist alleging that Feist's use of the Rural directory was copyright infringement. That issue was ultimately decided in Feist's favor by this Court in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. _____, 113 L.Ed. 2d 358, 111 S.Ct. 1281 (1991).[1]

By way of counterclaim in Rural's copyright infringement action, Feist alleged that Rural's refusal to grant Feist a license for updated

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1. The *Feist* copyright decision allowed access to published facts. However, that published factual information is generally out of date as compared to current listing information available to the telephone company as part of its monopoly. The fact that the currency of white page listings directly affects yellow page sales was conceded at oral argument in this Court:

> QUESTION (by Justice Stevens): I understand, but my question is would you create them [white pages] any differently if there were no copyright law protection? And if so, why.
>
> MR. CAPLINGER: Well, Justice Stevens, to answer that question, there's a market for this information that if we do not put accurate, complete listing information, we're not going to sell the yellow pages advertising. (Transcript of Oral Argument, *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, Case No. 89-1909, Jan. 9, 1991, p. 47.)

white page listing information was an unlawful extension of Rural's telephone service monopoly into the unregulated yellow page advertising market in violation of §2 of the Sherman Act. Feist's theory was that Rural had used its legal monopoly as a provider of telephone service in its relevant exchange area in an attempt to exclude Feist and other yellow pages publishers and obtain or preserve a monopoly in the unregulated yellow page advertising market in that area.

The district court agreed, after a three day trial, finding that:

1) Rural had "an intent . . . to exclude [Feist] in order to extend its monopoly into another relevant market." (Appendix, *infra,* at 23a).
2) Rural had monopoly power in both markets, telephone (*id.*, 7a) and yellow pages advertising (*id.*, 17a).
3) Rural "did not want any competition in the yellow pages advertising market." (*id.*, 24a)
4) "[t]he discovery materials strongly suggest that [Rural's] intent was to destroy competition." (*id.*, 24a)
5) "[t]he conduct of [Rural] impaired the opportunities of [Feist] and did not further competition on the merits." (*id.*, 24a)
6) "[Rural's] refusal to deal was exclusionary conduct, not competitive conduct." (*id.*, 24a-25a)
7) "[Rural] was willing to license its white pages listings to non competitors." (*id.*, 25a)
8) Rural's "real purpose was to extend its monopoly in telephone service to a monopoly in yellow pages advertising unlawfully." (*id.*, 25a)
9) Rural's alleged business justification for the refusal was not credible and its "behavior constitute[d] an illegal refusal to deal under §2 of the Sherman Act." (*id.*, 24a-25a)
10) "[Feist] demonstrated that [Rural's] refusal to license the white page listings had an impact on its market share and its advertising rate." (*id.*, 26a); AND
11) Even though "[Feist] was unable to identify anyone who had refused to purchase yellow pages advertising in its directory because the [Feist] northwest directory did not contain complete listings from the [Rural] service area" and unable "to identify anyone who had complained that the [Feist] northwest directory was incomplete" (*id.*, 26a), nevertheless, "the requirement of proof

of injury as an element of [Feist's] case was met" (*id.*, 26a) and the damage amount was "a conservative one, but an appropriate one." (*id.*, 27a)

The district court also awarded injunctive relief requiring Rural to license white page listings at a reasonable rate and to pay Feist's attorney's fees.

The Tenth Circuit reversed, holding that these findings did not amount to a specific finding of "harm to competition" apparently because Feist was able to enter the market and increase its market share to 20 percent. The court held that this defect in such specific proof was fatal to Feist's antitrust claim. (Appendix 5a, 6a). The Tenth Circuit held this despite the fact that the district court found that Rural's conduct had reduced Feist's market share below what it would have been absent that conduct. (id., 26a)

The district court's jurisdiction was based on 28 USC §1337. Tenth Circuit jurisdiction was based on 28 USC §1291.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's requirement of additional specific proof of harm to competition is contrary to this Court's holding in *U.S. v. Grinnell Corp.*, 384 U.S. 563 (1966) and *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

This Court has held that to establish monopolization under Section 2 of the Sherman Act, an antitrust plaintiff must demonstrate, "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell, supra,* 384 U.S. at 570-71. The Tenth Circuit has now added an additional requirement of specific proof of "harm to competition" to the burden Feist must carry to establish its cause herein.

That additional requirement is particularly troublesome here where the monopolist has leveraged its monopoly in one market to another by refusing to sell its monopoly product to competitors in the second market without a valid business justification and with an intent to exclude. "[T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *U.S. v. Griffith*, 334 U.S. 107

(1948). Unlike the typical monopoly leveraging case, Rural has succeeded by its refusal to deal in acquiring and maintaining a monopoly in the second market also. (Compare, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir 1979).)

Feist and other litigants have been provided no guidelines by the Tenth Circuit as to what additional specific proof is required. Proof of (1) monopoly power and (2) the intent to exclude a competitor without any business justification *does* establish harm to competition under this Court's jurisprudence. There should be no additional specific proof requirement.

In *Aspen Skiing, supra,* 472 U.S. at 605, this Court did deem relevant "whether [the refusal] has impaired competition in an unnecessarily restrictive way." However, footnote 32 here (*id.* at 605), focused on exclusionary conduct *as harming competition,* citing 3 Areeda & Turner, *Antitrust Law*, 78 (1978), for the proposition that:

> . . . 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

These factors [*i.e.*, (1) and (2) above], are *precisely* the findings which were made by the district court below. (Appendix 24a). Therefore, Rural has harmed competition under *Aspen* by engaging in exclusionary conduct in violation of Section 2.

This case is *not* the hypothetical one referred to in *Aspen Skiing,* 472 U.S. at 611 n. 44 where there is anticompetitive intent but no exclusionary conduct. As this Court aptly noted, that case is unlikely to arise.

Aspen focused on anticompetitive intent and the lack of business justification for the refusal. Likewise here, the findings below were that Rural's intent was anticompetitive and that it showed no business justification for the refusal to license its monopoly product. (Appendix 24a-25a).

The focus upon intent in determining whether a unilateral refusal to deal constitutes unlawful monopolization finds its origin in this Court's decision in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). *Aspen* adds that a monopolist's refusal to deal is unlawful if it does not arise from legitimate business purposes. The rationale is that it is appropriate to infer anticompetitive intent from conduct that has no valid business justification. A focus on the impact of a defendant's conduct may also show that anticompetitive

acts which are unreasonably restrictive of competition indicate that a defendant intends to create or perpetuate monopoly power. Regardless of the focus, the touchstone of liability is a defendant's willful, *i.e.*, intentional, acquisition or maintenance of monopoly power, as distinguished from growth or development on account of conduct that is honestly industrial. *Grinnell,* at 570-71.

Both focuses are directed toward answering the same question: Did the defendant intend to harm competition or was he merely pursuing legitimate business aims? Whichever way the question is framed the answer will be the same because conduct engaged in for legitimate business purposes does not harm competition, as opposed to individual competitors. Conversely, exclusionary conduct by a monopolist without a legitimate business justification does harm competition and no additional showing should be required.

II. The opinion below places the Tenth Circuit in conflict with the Fifth and Seventh Circuits by requiring this additional specific proof of harm to competition.

Other Circuits have held that additional proof of competitive harm is not necessary in a case where the traditional elements of monopolization have been found. For example, the Fifth Circuit holds:

> Section 2 does not explicitly require a plaintiff to prove anticompetitive effect; the plaintiff must prove only the existence of monopoly power and the willful maintenance or acquisition of that power. *Injury to competition is apparently presumed to follow from the conduct proscribed by §2.*

Walker v. U-Haul Co. of Mississippi, 734 F.2d 1068, 1073 n 19 (5th Cir 1984). (Emphasis supplied.)

Perhaps the court below was relying on the proposition that no harm to consumers, and thus no harm to competition, had been shown. While the lower court opinion does not support such a finding, such an additional requirement, in any event, has been expressly rejected by the Seventh Circuit in *Fishman v. Estate of Wirtz*, 807 F.2d 520, at 536 (7th Cir 1986):

> We have found no case (and none has been cited to us) in

> which the Supreme Court has put the burden on a plaintiff to isolate and demonstrate the consumer impact of a particular purported antitrust violation not directed at the consumer level. While antitrust law may be moving in the direction of being construed as a 'pure' consumer protection measure, cases such as *Otter Tail* strongly suggest that in the natural monopoly area, at least, the Supreme Court has not embraced this approach.

A resolution of this conflict between the Circuits would provide needed guidance to lower courts and potential litigants.

CONCLUSION

The import of this decision extends beyond the two parties herein. Yellow page advertising revenue in the United States is expected to exceed $9 billion in 1992. National policy in the entire telecommunication industry is to encourage competition. *U.S. v. AT&T*, 552 F.Supp. 131 (D. D.C. 1982), aff'd *sub nom. Maryland v. U.S*, 460 U.S. 1001 (1983). The decision below is contrary to that national policy in this important industry.

Feist, and other independent directory publishers like it, have brought numerous directory innovations to the directory business since the breakup of AT&T. (*e.g.*, emergency numbers, separate government and school listings, cover maps, other city maps, area wide phone coverage, etc.) This type of innovation and competition by Feist, and others, should be encouraged by this Court, and the antitrust law. To allow Rural (or any other phone company), to refuse listing access to Feist with a specific intent to exclude Feist as a competitor and with no business justification does not protect *competition*, but instead protects one *competitor*—Rural. Certiorari should be granted to correctly instruct the courts below and the competitors in this major industry as to applicable law.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RURAL TELEPHONE SERVICE COMPANY, INC.,	)	
Plaintiff-Appellant,	)	
v.	)	No. 90-3254
FEIST PUBLICATIONS, INC.	)	
Defendant-Counter-Claimant-Appellee.	)	

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 83-4086-R)

Mark E. Weber, Gibson, Dunn & Crutcher, Los Angeles, California (James M. Caplinger, Jr., Topeka, Kansas, on the brief), for Plaintiff-Appellant.

Kyler Knobbe, Ridenour & Knobbe, Cimarron, Kansas, for Defendant-Counter-Claimant-Appellee.

Before MOORE and SETH, Circuit Judges, and BRATTON, * District Judge.

MOORE, Circuit Judge.

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*Honorable Howard C. Bratton, United States Senior District Judge for the District of New Mexico, sitting by designation.

This is an appeal from an order of the district court finding defendant Rural Telephone Service Company's refusal to deal with plaintiff Feist Publications, Inc., violated § 2 of the Sherman Act, 15 U.S.C. § 2. *Rural Tel. Serv. Co. v. Feist Publications, Inc.*, 737 F. Supp. 610 (D. Kan. 1990). The district court found Rural Telephone possessed monopoly power in the yellow pages advertising market and Rural Telephone's decision not to license its white pages listings to Feist Publications was an act designed to maintain its monopoly position. Based on this finding, the district court awarded treble damages in the amount of $99,000 for the years 1978-1987 to Feist Publications and enjoined Rural Telephone from refusing to license its white pages listings to Feist Publications at a reasonable rate. It further awarded Feist Publications reasonable attorney fees. Rural Telephone assigns several errors to the district court's findings, including an under-inclusive definition of the relevant market, an erroneous finding of monopoly power, and a deficient determination of injury and damages. We need not deal with those issues because we conclude Feist Publications failed to prove Rural Telephone's refusal to deal was anti-competitive in effect. Therefore, we reverse the judgment of the district court.

I.

Rural Telephone is a nonprofit, cooperative telephone company granted monopolist status by the State of Kansas to provide telephone service to subscribers in designated areas of northwest Kansas. All of the telephone subscribers in the Rural Telephone service area are member owners. Under Rural Telephone's charter, all revenues exceeding its cost of doing business are returned to its members under a refund plan.

As required by the Kansas Corporation Commission, Rural Telephone publishes and distributes an annual telephone directory. In addition to its white pages listings, Rural Telephone's directory also contains yellow pages advertising.

Feist Publications is a private Kansas corporation that distributes a competing telephone directory in northwest Kansas. The directory includes communities outside of Rural Telephone's service area, and Feist Publications competes with Rural Telephone for yellow pages advertising. In compiling its area-wide directory, Feist Publications approached the eleven telephone companies covering northwest Kansas and offered to purchase their white pages listing information.

In 1978, Feist Publications asked to purchase Rural Telephone's copyrighted[1] listings at a price of ten cents per listing. Rural Telephone declined the offer, but Feist Publications copied the listings nonetheless and incorporated them in its own directory. When Rural Telephone sued Feist Publications for violation of its copyright, Feist Publications counterclaimed with a Sherman Act violation. That counterclaim forms the basis for this case.

II.

Illegal monopolization under § 2 of the Sherman Act has two distinct elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp*, 384 U.S. 563, 570-71 (1966); *Aspen Highlands Skiing Crop. v. Aspen Skiing Co.* (*Aspen Highlands*), 738 F.2d 1509, 1519 n.12 (10th Cir. 1984), aff'd, 472 U.S. 585 (1985) (*Aspen Skiing*); *Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819, 823 (10th Cir. 1987); *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 973 (10th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 3241 (1990).[2] Additionally, plaintiff must show causal antitrust injury.[3]

A refusal to deal may be one of the mechanisms by which a monopolist maintains its power. In determining whether a monopolist which has refused to deal with a competitor has acted lawfully or in violation of § 2, we apply a two-part test. First, we look at the effects of the monopolist's conduct. Second, we look at its motivation. *Aspen*

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1. In *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, __ U.S. __, 111 S.Ct. 1282 (1991), the Supreme Court held Rural's copyright did not extend to the information contained in its white pages listings.

2. In this circuit, monopoly power is defined as the ability to control prices and exclude competition. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 164 (10th Cir. 1986). In defining the relevant market, two aspects must be considered: the product market and the geographic market. *See Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 246 (10th Cir. 1976) (geographic area), *cert. denied*, 429 U.S. 1122 (1977), and *Telex Corp. v. IBM*, 510 F.2d 894, 914 (10th Cir.) (product area), *cert. dismissed*, 423 U.S. 802 (1975). For the purposes of this opinion, we assume the possession of monopoly power in the relevant market.

3. "Of course, the fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown for a private litigant to recover on a claim of monopolization." *Aspen Highlands*, 738 F.2d at 1519 n. 12; *Reazin*, 899 F.2d at 973.

Highlands, 738 F.2d at 1519.[4] Because we conclude Feist Publications failed to prove Rural Telephone's refusal to deal had anti-competitive effects, we do not reach the second stage of analysis.

When examining the effects of Rural Telephone's conduct, we must determine whether its refusal to deal is likely to enable it to foreclose competition, to gain a competitive advantage, or to destroy competition. *See United States v. Griffith*, 334 U.S. 100, 107 (1948); *Westman Comm'n Co. v. Hobart Int'l. Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988).[5] Feist Publications must demonstrate Rural Telephone's conduct was intended to or did have some anti-competitive effect beyond its own loss of business. *California Computer Prods., Inc. v. IBM*, 613 F.2d 727, 732 (9th Cir. 1979). *Accord Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F. 2d 683, 697 (10th Cir. 1989), *cert denied*, ___ U.S. ___, 111 S. Ct. 441 (1990); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991).[6] Additionally, Feist Publications must show the injury inflicted is the type the Sherman Act was intended to forestall. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977).

Feist Publications alleges Rural Telephone's refusal to license its white pages listings cause Feist Publications' white pages listings to be incomplete, which in turn cause Feist Publications' yellow pages advertising revenues to decline. However, the district court did not

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4. In *Aspen Highlands*, the court focused on the motivation and competitive effect of the refusal to deal. 738 F.2d at 1519. If the challenged activity is likely to have an anti-competitive effect, we must then examine whether the refusal to deal is fairly characterized as "exclusionary" or "anti-competitive." *Aspen Skiing*, 472 U.S. at 602. It is at this stage we consider the monopolist's asserted business justification. *Id.* at 608-11.

5. "We adhere to the view that the antitrust laws should not restrict the autonomy of independent businessmen when their activities have no adverse impact on the price, quality, and quantity of goods and services offered to the consumer. Thus, we consider Hobart's refusal to deal in light of its effect on consumers, not on competitors." *Westman v. Hobart*, 796 F.2d at 1220 (citation omitted).

6. It is important to remember "the antitrust laws, however, were enacted for the protection of competition, not competitors," and courts must always be mindful lest these laws be invoked perversely in favor of those who seek protection against the rigors of competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

make a specific finding of harm to competition.[7]

In reaching its conclusions, the district court focused considerably on Rural Telephone's alleged anti-competitive intent. Assuming Rural Telephone's refusal to deal was motivated by an intent to exclude Feist Publications from the yellow pages advertising market, anti-competitive intent alone is insufficient to establish a violation of § 2. *Aspen Skiing*, 472 U.S. at 602, 611 n.44. *See also Pacific Eng'g & Prod. Co. of Nev. v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.) ("To prove that a person has that type of exclusionary intent which is condemned in anti-trust cases there must be evidence that the person who foresees a fight to the death intends to use or actually does use unfair weapons. Putting the same idea in another way, we may say that there is no sharp distinction between (a) the existence of an intent to exclude and (b) the use of unfair means."), *cert. denied*, 434 U.S. 879 (1977); *Bright v. Moss Ambulance Serv.*, 824 F.2d at 824; *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101, 1113 (1st Cir.1989) ("[T]he desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws . . . As long as Blue Cross's course of conduct was itself legitimate, the fact that some of its executives hoped to see Ocean State disappear is irrelevant."), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1473 (1990); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir.1986) ("We add, what has become an antitrust commonplace, that if conduct is not objectively anti-competitive the fact that it was motivated by hostility to competitors ('these turkeys') is irrelevant."), *cert. denied*, 480 U.S. 934 (1987); *Oahu Gas Serv., Inc., v. Pacific Resources, Inc.*, 838 F.2d 360, 370 (9th Cir.) (a finding of anti-competitive intent will not sustain a § 2 claim in the face of evidence of pro-competitive effects), *cert. denied*, 488 U.S. 870 (1988).

Moreover, Feist Publications was unable to identify anyone who had refused to purchase yellow pages advertising in its directory because the Feist Publications northwest directory did not contain

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7. The district court found Rural Telephone's refusal to deal "did not further competition on the merits." *Rural*, 737 F.Supp. at 622. This is insufficient to constitute actual or threatened harm to competition. Although the court did find Feist Publications' opportunities had been impaired, the antitrust laws were enacted for the protection of competition, not individual competitors. *Brunswick*, 429 U.S. at 488.

complete listings from the Rural Telephone service area. Feist Publications was also unable to identify anyone who had complained that the Feist Publications northwest directory was incomplete. This is a fatal failure of proof.

Additionally, Feist Publications offered no proof competition in the yellow pages advertising market was reduced as a result of Rural Telephone's actions. Between 1978 and 1987, Feist Publications' market share rose from zero to twenty percent. Further, during the same years, the price for a quarter column ad remained competitive, with Feist Publications generally charging substantially more than Rural Telephone. Finally, due to different publication dates, Feist Publications' directory often contained listings not available in Rural Telephone's directory. Because Feist Publications has failed to prove harm to competition, its antitrust claim must fail.[8]

REVERSED.

8. Although not argued by the parties, we note the provision in Rural Telephone's charter requiring all revenues in excess of the cost of doing business to be returned to the subscribers raises an interesting question. Feist Publications' argument seems to be that Rural Telephone was monopolizing on behalf of its subscribers. As we noted in *Colorado Interstate Gas*, the Sherman Act is not aimed at those who monopolize or attempt to monopolize on behalf of another party. *Colorado Interstate Gas v. Natural Gas Pipeline*, 885 F.2d at 692 n. 15.

RURAL TELEPHONE SERVICE COMPANY, INC., Plaintiff

v.

FEIST PUBLICATIONS, INC., Defendant.

No. 83-4086-R.

United States District Court,
D. Kansas.

April 5, 1990.

James M. Caplinger, Jr., Topeka, Kan., for plaintiff.

Kyler Knobbe, Ridenour and Knobbe, Cimarron, Kan., for defendant.

MEMORANDUM AND ORDER

ROGERS, District Judge.

This is an antitrust action brought by way of a counterclaim. Feist Publications, Inc. (FP) contends that Rural Telephone Service Company, Inc.'s (RTSC) refusal to license white page telephone listings to it is an antitrust violation under the "essential facility" theory and/or "intent to monopolize" theory of section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. A trial to the court has been concluded. The court is now prepared to issue findings of fact and conclusions of law.

FINDINGS OF FACT

1. RTSC is a cooperative telephone company providing service to various communities in northwest Kansas. All of the telephone subscribers in the RTSC service area are member owners. RTSC is a nonprofit business with all revenues exceeding the cost of doing business returned to members under a refund plan called capital credits. RTSC is a certified public utility and, as such, is regulated by the Kansas Corporation Commission (KCC). The service area of

RTSC consists of the area colored in yellow on the map attached to this memorandum and order as Attachment No. 1. RTSC has approximately 4,700 telephone subscribers.

2. In the course of its business, RTSC compiles, publishes and distributes telephone directories covering the geographical area in which it provides telephone service. The KCC requires all telephone companies operating in Kansas to issue at least annually a dated telephone directory. The telephone directories published by RTSC contain white pages and yellow pages. The white pages list in alphabetical order the names, addresses and telephone numbers of RTSC's telephone subscribers. The yellow pages list RTSC's business subscribers alphabetically under the appropriate business classifications and contain classified advertisements of various sizes purchased by RTSC's business subscribers.

3. On August 1, 1974, RTSC entered into a "Telephone Directory Publishing Contract" with Leland Mast Directory Company to publish its annual telephone directory until December 31, 1985. Pursuant to the contract, RTSC granted Leland Mast Directory Company the exclusive rights to compile, print and sell advertising in RTSC's annual telephone directory during that period of time. On July 29, 1985, RTSC entered into an agreement with the Gronseth Directory Service Corporation to publish its annual telephone directory until October 31, 1990.

4. FP is a Kansas corporation that publishes and distributes telephone directories in Kansas and other states. FP publishes and distributes regional telephone directories. These directories are designed to cover certain trade areas and to allow telephone subscribers to have access to telephone numbers in nearby communities. FP first produced a directory for southwest Kansas in 1977. FP produced a directory for northwest Kansas in 1978. The northwest directory covered fifteen counties. The directories produced by FP contained the same white pages and yellow pages similar to the RTSC directory. The advertising contained in the directories, especially the advertising contained in the yellow pages, provides the revenue for FP.

5. The inclusion of white pages listings is necessary for the production of a successful independent telephone directory. Independent directories containing only yellow pages have not been successful. In order to obtain the white pages listings for its directory, FP contacted the telephone companies providing service in the areas of its regional directory. FP sought to obtain the white pages

listings by paying the telephone companies for the listings. Some of the companies refused to license their white pages listings initially, but ultimately most have agreed to license the listings. All of the telephone companies in northwest Kansas agreed to provide the listings except RTSC. Each agreement also provides that the telephone company will provide FP with updated listings. The cost for the listings ranged from $ .01 to $ .49 for each listing.

6. Tom Feist of FP contacted Henry Austerman, the manager for RTSC, in 1978 about obtaining the white pages listings. Austerman invited Feist to appear at the next board meeting and make a presentation to the RTSC board of directors. Feist agreed and made a presentation at the April 28, 1978 meeting of the RTSC board of directors. Feist offered to pay $ .10 for each of RTSC's listings. The issue was left unresolved at that meeting. The minutes from the meeting reflect the following:

> Representative from area-wide telephone directory was admitted to the meeting at this time, a Mr. Tom Feist from Spearville, Kansas. His main objective was to purchase from us our directory listings so as to establish a wide area directory for western Kansas. After much discussion on this request the board, upon a motion duly made, seconded, and unanimously approved, voted to table the request indefinitely.

7. Feist eventually learned that it was unlikely that FP would receive the listings from RTSC. RTSC refused to provide the white pages listings to FP in order to extend its monopoly in telephone service into yellow pages advertising. The refusal to deal was not motivated by a legitimate business reason, but by an intent to exclude competition in the yellow pages advertising market in the RTSC service area. Feist made no further direct efforts to obtain the listings from RTSC, but he did make several indirect attempts through other individuals. These efforts were unsuccessful.

8. RTSC later licensed its white pages listings to other telephone companies for inclusion in their directories. RTSC provided its listings from Olmitz, Kansas to H & B Communications, Inc. and the Wilson Telephone Company for its 1986-1987 and 1987-1988 telephone directories. These telephone companies did not sell yellow pages advertising in the RTSC service area. RTSC was paid $ .50 per listing for the Olmitz listings.

9. The directory produced by RTSC in 1977-1978 contained only white pages listings for the communities within its service area. In

the following year, RTSC expanded its directory to include listings for towns outside its service area. In order to include white pages listings from communities outside its service area, RTSC licensed these listings from the local telephone companies. RTSC paid from $ .01 to $ .49 for these listings. RTSC also sold yellow pages advertising in areas outside of its service area. RTSC, however, did not distribute its directory outside of its service area. RTSC continued these practices in subsequent years.

10. The 1978 northwest Kansas directory produced by FP did include the RTSC white pages listings. FP obtained a copy of the RTSC directory and used the listings without RTSC's knowledge. FP hired verifiers to confirm as many names and telephone numbers as possible. FP did not include any RTSC subscriber in its directory that was not independently verified. This policy meant that many of the RTSC subscribers would not be included in the FP directory because of the problems of verification. FP continued the practice of using the RTSC directory through 1983 for each of its annual northwest Kansas directories. Feist believed that it was necessary to include the communities in the RTSC service area because such an omission would have created "enormous holes" in the FP northwest directory. Feist thought that a lack of complete coverage would have rendered the FP directory ineffective. During the period from 1978 to 1983, FP continued to pay for listings from the other telephone companies in the northwest Kansas area.

11. In 1983, RTSC filed the instant action for copyright infringement after finding fictitious listings in FP's directory. RTSC alleged that FP had infringed the copyright on RTSC's 1982-1983 telephone directory. FP responded with the instant counterclaims. FP alleged that its yellow pages advertising had declined because it had incomplete RTSC white pages listings due to RTSC's refusal to enter into a license agreement with FP.

12. On January 5, 1987, the court granted summary judgment to RTSC in its copyright infringement claim. 663 F.Supp. 214. The court subsequently awarded damages to RTSC in the amount of $6,000. The court also awarded attorney's fees to RTSC. These decisions were affirmed by the Tenth Circuit Court of Appeals on March 9, 1990.

13. Each telephone company publishes its directory at a different time of the year. RTSC has generally published its directory in October of each year. FP has generally published its northwest directory in January of each year.

14. The white pages listings in a telephone directory change substantially each year. Feist estimated that the listings change 30 to 35 percent every year.

15. Due to RTSC's failure to license its white pages listings, the FP northwest directory over the years was only 70 percent complete in the RTSC service area. The FP northwest directory, however, also had listings that were not in the RTSC directory. This was apparently due to FP's later publication date and to FP's verification process.

16. FP was unable to identify anyone who had refused to purchase yellow pages advertising in its directory because the FP northwest directory did not contain complete listings from the RTSC service area. FP was also unable to identify anyone who had complained that the FP northwest directory was incomplete.

17. The financial success of any telephone directory is dependent upon advertisers and potential advertisers perceiving that the directory is used by the consumers to whom it is distributed. Customer usage depends on the accuracy, completeness and timeliness of the information contained in the directory. However, information in the telephone directory becomes increasingly inaccurate with the passage of time. This is the reason that the directories are published on an annual basis.

18. In 1987, the advertising revenues and respective market shares for the competitors in the RTSC service area were as follows:

Directory	Advertising revenues ($)	Market Shares (%)
Rural Telephone	56,010.60	75.8
Feist Publications	14,705.50	19.9
Phillipsburg	954.00	1.3
Wakeeney	735.60	1.0
Russell	414.00	0.6
Sunflower-Brewster Regional	300.60	0.4
Hays	279.00	0.4
Colby	270.00	0.4
Gorham	138.00	0.2
Plainville	45.00	0.1
Total	$73,851.80	

19. In 1987, the advertising revenues for FP, RTSC and other local telephone companies were as follows:

Service Area	Feist's Revenues	Local Telco's Revenues	Other Dir's. Revenues
Rural Tel.	14,705.00	56,010.60	3,136.20
Wakeeney (United Tel.)	52,785.00	115,946.10	11,877.00
Phillipsburg (SWB)	11,888.00	22,506.00	10,036.80
Norton (SWB)	35,871.00	50,661.00	15,953.00
Atwood (SWB)	12,712.00	12,414.00	166.80
Colby (SWB)	92,602.00	114,327.00	23,325.60
Goodland (SWB)	41,050.00	67,434.00	14,932.20
Plainville (SWB)	14,487.00	29,889.00	7,071.00
Hays (SWB)	149,545.00	304,617.00	51,294.75
Sunflower-Brewster Reg.	22,222.00	101,492.40	2,563.80
Ness City (Continental)	14,041.00	27,252.60	4,757.20
Elkhart Tel.	18,320.00	42,724.50	846.00
Jetmore Tel.	3,168.00	7,666.60	1,206.00
Ashland (United Assoc.)	55,461.00	85,264.25	4,729.40
LaCrosse (SWB)	3,677.00	8,004.00	3,039.00
Russell (United Tel.)	14,788.00	104,005.20	27,626.20
Ellinwood (United Tel.)	12,771.00	28,380.60	9,742.20
Hoisington (Cont. Tel.)	12,111.00	41,313.60	10,459.20
Little River (Mutual Tel.)	3,335.00	2,416.50	510.00
Great Bend (SWB)	142,226.00	346,239.00	45,107.25
Total for 19 Service Areas Where Local Companies License White Page Listings	713,060.00	1,512,553.35	245,243.40
Gorham Tel.	349.00	1,984.80	2,988.60
Galva (Home Tel.)	4,419.00	4,092.60	834.60
Wilson & H & B Tel. Cos.	7,433.00	32,793.60	8,121.75
Total for 3 Service Areas Where Local Companies Do Not License	12,201.00	38,871.00	11,944.95
Total for All Areas Except Rural Service Area	725,261.00	1,551,424.35	257,188.35

Total Adv. Revenues	Feist's Market Share (%)	Feist's Revenues As % of Local Telco's Revenue	Local Telco's Market Share
73,851.80	19.9	26.3	75.8
180,608.10	29.2	45.5	64.2
44,430.80	26.8	52.8	50.7
102,485.00	35.0	70.8	49.4
25,292.80	50.3	102.4	49.1
230,254.60	40.2	81.0	49.7
123,416.20	33.3	60.9	54.6
51,447.00	28.2	48.5	58.1
505,456.75	29.6	49.1	60.3
126,278.20	17.6	21.9	80.4
46,050.80	30.5	51.5	59.2
61,890.50	29.6	42.9	69.0
12,040.60	26.3	41.3	63.7
145,454.65	38.1	65.0	58.6
14,720.00	25.0	45.9	54.4
146,419.40	10.1	14.2	71.0
50,893.80	25.1	45.0	55.8
63,883.80	19.0	29.3	64.7
6,261.50	53.3	138.0	38.6
533,572.25	26.7	41.1	64.9
2,470,856.75	28.9	47.1	61.2
5,322.40	6.6	17.6	373.0
9,346.20	47.3	108.0	43.8
48,348.35	15.4	22.7	67.8
63,016.95	19.4	31.4	61.7
2,533,873.70	28.6	46.7	61.2

20. For the period from 1977 to 1987, RTSC has had an annual rate increase of 11.9 percent. During the period from 1979 to 1987, FP has had an annual rate increase of 6.2 percent. The average rate of increase for all directories in Kansas from 1977 to 1987 was 8.3 percent. The average rate of increase for telephone companies that refused to license white pages listings, including RTSC, was 14.2 percent. The average rate of increase for all directories in the United States between 1977 and 1987 was 6.6 percent. The average rate in the United States in 1987 for a quarter column advertisement in directories falling into the distribution size category of the RTSC directory (10,000-24,000) was $283.64 while the RTSC rate was $333.60. The average rate in the United States in 1987 for a quarter column advertisement in directories falling into the distribution size of the FP northwest directory (50,000-99,000) was $386.97 while the FP rate was $324.00.

CONCLUSIONS OF THE LAW

Monopolization and Attempted Monopolization

FP alleges that the RTSC has violated § 2 of the Sherman Act by attempting to monopolize and monopolizing the yellow pages advertising market by refusing the license the white pages listings. Section 2 of the Sherman Act provides that:

> [e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states . . . guilty of a misdemeanor.

15 U.S.C. § 2.

To prove monopolization, FP must show: (1) that RTSC has possession of monopoly power in the relevant market; and (2) that RTSC willfully engaged in conduct designed to acquire, maintain or enhance its monopoly power. *Aspen Skiing Co., v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595, 105 S.Ct. 2847, 2853, 86 L.Ed.2d 467 (1985). To establish a claim of attempted monopolization, FP must show: (1) a specific intent by RTSC to monopolize a relevant market; (2) predatory or anti-competitive conduct by RTSC; and (3) a dangerous probability of success. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 161 (10th Cir.1986). In addition, the fact of injury and damages suffered by reason of a violation of the anti-trust laws must also be shown for FP to prevail on its claims. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1519 n. 12 (10th Cir.1984), *aff'd on other grounds*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1984). The mere intention to exclude

competition and to expand one's own business is not sufficient to prove a specivic intent to monopolize. See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.1977), *cert. denied*, 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977). Specific intent may be established by direct proof, or it may be inferred from predatory conduct, i.e., conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition. *Great Escape, Inc. v. Union City Body Co., Inc.*, 791 F.2d 532, 541 (7th Cir.1986). Evidence of intent in a monopolization claim is merely relevant to the question whether the challenged conduct is fairly characterized as exclusionary or anti-competitive. *Aspen Skiing Co.*, 472 U.S. at 602, 105 S.Ct. at 2857.

Relevant Market

Monopoly power is the power to dominate or control a market. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1004, 100 L.Ed. 1264 (1956). If monopoly power exists, it must be found to exist within an economically meaningful market, or what is called a relevant market. There are two aspects to be considered in defining the relevant market: the relevant product market and the relevant geographic market. *Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381, 1392 (9th Cir.1984), *cert. denied*, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984). The determination of relevant market is essentially a question of fact. *Aspen Highlands Skiing Corp.*, 738 F.2d at 1514 n. 4. The burden of establishing the relevant product and geographic market falls upon FP. *See Gough v. Rossmoor Corp.*, 585 F.2d 381, 389 (9th Cir.1978).

Product Market

The relevant product market consists of those products which are reasonable substitutes from a buyer's point of view. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962). In this case, FP claims that the relevant product market is yellow pages advertising. RTSC does not disagree on this contention. The evidence further supports this stipulation since yellow pages advertising is a unique form of advertising which has no substitute.

Geographic Market

The relevant geographic market is the area in which RTSC faces competition from suppliers of competing products that are in the relevant product market, and to which a buyer can practically turn

for the product. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 369 n. 1, 93 S.Ct. 1022, 1026 n. 1, 35 L.Ed.2d 359 (1973); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28, 81 S.Ct. 623, 627-28, 5 L.Ed.2d 580 (1961). The commercial realities of the industry are the major factors in determining the relevant geographic market. *Ralph C. Wilson Industries v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1383 (9th Cir.1986). FP contends that the relevant geographic market in this case is the RTSC service area, and their evidence is designed to show monopoly power in that particular area. This area is identified as the yellow area on Attachment No. 1. RTSC contends that the relevant geographic market in this case extends beyond the expanse of its service area and includes, *inter alia*, the trade centers of Colby, Hays and Phillipsburg, and that there was no evidence that RTSC exercised monopoly powers in this broadened geographic market. This area consists of the yellow, light blue, red, purple, green, blue, dark brown and brown (only that area between the light blue and yellow) on Attachment No. 1.

[1] The court finds that the evidence establishes that the RTSC service area is the relevant geographic area in this case. This is the area where RTSC and FP effectively compete. It is in this area that the consumer has two choices for purchasing yellow pages advertising that reaches the local community and the regional communities. The area suggested by RTSC is not the area of effective competition. It is true that RTSC and FP do compete in those areas. The RTSC directory, however, is not a legitimate substitute for the FP directory in areas outside the RTSC service area because the RTSC directory is not distributed in those areas. Thus, an advertiser in the areas outside the RTSC service area does not view the RTSC directory and FP directory as substitutes for each other because the RTSC directory is not useful in that advertiser's local community. This advertiser has three choices: the FP directory, the RTSC directory, and his local telephone company directory, which may or may not be a regional directory. For purposes of advertising his business locally and to other areas, the advertiser is restricted to advertising in the FP directory and his local telephone company directory, if it is also a regional directory. The RTSC directory is not a valid substitute for either of these directories because the advertising will not be seen by the local community since the directory is not distributed there. Accordingly, the only area of effective competition here is the RTSC service area. This is the area where advertisers have choices of two similar products.

Monopoly Power

[2] Having identified and defined the relevant market, we turn to the question of whether RTSC has monopoly power in that market. Monopoly power is the power to control prices *and* to exclude competition in the relevant market. *Shoppin' Bag, Inc.*, 783 F.2d at 164. Monopoly power may be shown through market share, i.e., percentage of the relevant market. *Id.* at 161. The existence of monopoly power will ordinarily be inferred when a defendant has a predominant share of the market. *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). Market share alone, however, does not establish monopoly power. *Bright v. Moss Ambulance Service, Inc.*, 824 F.2d 819, 824 (10th Cir.1987). Other factors should also be considered, including the number and strength of the defendant's competitors, the difficulty or ease of entry into the market by new competitors, and consumer sensitivity to change in prices. *Shoppin' Bag, Inc.*, 783 F.2d at 162.

The court finds sufficient evidence of monopoly power here. RTSC had a market share of 75.8% in 1987. A strong inference of monopoly power is raised by this fact alone. Moreover, other factors suggest that RTSC has monopoly power. The evidence before the court shows that RTSC has been able to raise prices over the years without suffering any loss in market share. From 1977 to 1987, RTSC had a higher average annual rate of increase than other telephone companies in Kansas; yet, in 1987, RTSC maintained a higher market share than the average market share of the other telephone companies in Kansas. In addition, RTSC has been able to charge a higher advertising rate than other telephone directories of its size on a national basis. Finally, we note that entry into the relevant market would be difficult for any competitor to RTSC because of time and money factors. In sum, RTSC had monopoly power in the relevant market.

Willful Maintenance of Monopoly Power: Refusal to Deal

The existence of monopoly power in the relevant market, however, does not by itself prove the offenses of actual monopolization or attempted monopolization. A monopolist's behavior is not unlawful unless the monopolist has engaged in the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell*, 384 U.S. at 570-71, 86 S.Ct. at 1704. FP contends that RTSC's refusal to license the white pages listings amounts to an illegal refusal to deal in violation of § 2 of the Sherman

Act. There are two distinct lines of cases which have imposed a duty to deal upon a monopolist—the "essential facilities" doctrine, or "bottleneck" theory, and the "intent" test. *Aspen Highlands Skiing Corp.*, 738 F.2d at 1519. In *Aspen Highlands Skiing Corp.*, the Tenth Circuit made the following comments about these two theories:

> We recognize that the cases do not fit neatly into these two categories. There is a significant amount of overlap between them. Nevertheless the dichotomy, though in part illusory, is a useful analytical tool. (Footnotes omitted.)

Id. at 1519-20

Essential Facilities (or bottleneck)

FP has alleged as part of its monopolization claim that RTSC refused to deal with FP and thereby denied FP access to a facility essential to competition in the marketplace. FP alleges that RTSC denied it access to the white pages listings without a valid business reason.

Ordinarily, a business has no legal obligation to deal with its competitors. *Aspen Skiing Co.*, 472 U.S. at 600, 105 S.Ct. at 2856. There are situations, however, in which the federal courts have found a duty under § 2 of the Sherman Act for a monopolist to trade with all on nondiscriminatory terms. One of these instances is where the monopolist controls an "essential facility." The "essential facilities" doctrine imposes on the owner of a facility that cannot be reasonably duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis. *McKenzie v. Mercy Hospital of Independence, Kansas,* 854 F.2d 365 (10th Cir.1988). The doctrine was established in § 1 cases. *See United States v. Terminal Railroad Association*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912) (consortium of railroads owning a terminal facility that was only feasible facility when coming to city from east must make facility available to other railroads); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (Associated Press enjoined from continuing its practice of refusing to furnish its service to its members' competitors). In *Otter Tail*, the Supreme Court employed the essential facilities doctrine, although not referring to it by name, to conclude in a § 2 case that a regulated electric utility had used its monopoly power unlawfully to eliminate competition in the retail sale of electric power. In recent times, the federal courts of appeals, including the Tenth Circuit, have adopted standards to determine whether a monopolist's refusal to deal constitutes a violation of the

essential facility doctrine under § 2. In *Aspen Skiing Co., v. Aspen Highlands Skiing Corp.*, 738 F.2d 1509 (10th Cir.1984), *aff'd on other grounds*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985), the Tenth Circuit, relying on *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081 (7th Cir.1983), cert. denied, 464 U.S. 891. 104 S.Ct. 234, 78 L.Ed.2d 226 (1983), determined that four elements were necessary to establish liability under the doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. 738 F.2d at 1520.

Three of the elements of the doctrine are not in dispute here. There is no question that RTSC has control over the white pages listings; that RTSC denied FP use of the listings; and that RTSC could easily provide the listings to FP. The only issue in dispute is the essentiality of the white pages listings, i.e., FP's ability to duplicate them.

[3] A monopolist's facility is essential to rivals only where vital to their competitive viability. *Areeda & Hovenkamp*, 1989 Supplement to Antitrust Law 723 (1989). The defendant's resource is not vital if an equivalent is available from other sources. *See McKenzie v. Mercy Hospital of Independence, Kansas, supra* (hospital emergency room and obstetrical care unit not essential facility for plaintiff who performed same services in his own private office); *Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976 (9th Cir.1988) (minidome was not essential facility because plaintiff failed to offer sufficient evidence that monopolist's competitor could not construct another equally adequate facility in the area); *Flip Side Productions v. Jam Productions*, 843 F.2d 1024 (7th Cir.1988), *cert. denied*, 488 U.S. 909, 109 S.Ct. 261, 102 L.Ed.2d 249 (1988) rock concert arena not essential facility where several alternatives available); *Florida Fuels, Inc. v. Belcher Oil Co.*, 717 F.Supp. 1528 (S.D. Fla.1989) (competitor's fuel storage tanks at port were not essential facility which could not be duplicated for providing bunkers to cruise ships where plaintiff fuel oil company made no showing why other sites were unsuitable); *Driscoll v. City of New York*, 650 F.Supp. 1522 (S.D.N.Y.1987) (municipal pier was not essential facility where there were privately owned alternatives); *Robinson v. Magovern*, 521 F.Supp. 842 (W.D.Pa.1981), *aff'd*, 688 F.2d 824 (3d. Cir.1982) (hospital was not an essential facility for physician with staff privileges at other hospitals in area). The question of equivalence can cover a wide range since everything that is legal and possible is

available at some price. A facility is not essential unless the plaintiff shows his "inability practically or reasonably to duplicate" it. *MCI Communications*, 708 F.2d at 1132. "An inquiry into the practicality of duplicating the facility should include economic, regulatory and other concerns." *Florida Fuels*, 717 F.Supp. at 1533. It is insufficient for plaintiff to show that access to the facility is merely "more economical" than other alternatives. *Florida Cities v. Florida Power & Light,* 525 F.Supp. 1000, 1007 (S.D.Fla.1981).

Circumstances similar to those in this case have arisen in other cases. In *Bellsouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.* 719 F.Supp. 1551 (S.D.Fla.1988), plaintiff, an independent telephone directory publisher, filed an antitrust action against the telephone company alleging that the telephone company had maintained monopoly power by not providing it with information such as business classifications and updates. The court held that the plaintiff could apply the essential facility doctrine to this information to prove intent to monopolize. 719 F.2d at 1566. The court, however, determined that factual disputes were present as to the essentiality of the information and the availability of the information from alternative sources. *Id.*

In *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir.1987), the Sixth Circuit held, based on uncontroverted evidence, that the service of providing business classifications was not an essential facility because such information was unreliable and thus had to be duplicated in any event by a competitor. *Id.* at 613. The Sixth Circuit further held that the telephone company did not control essential facilities in the form of simultaneous delivery of its white pages and the yellow pages published by a sister subsidiary and the billing of yellow pages listings and advertisements in telephone bills. *Id.* The evidence had shown that the competing producers of yellow pages could provide simultaneous delivery and that the telephone company charged its sister subsidiary a fee far in excess of its costs for the dual billing. *Id.*

In *White Directory of Rochester, Inc. v. Rochester Telephone Corp.*, 714 F.Supp. 65 (W.D.N.Y.1989), the court held, based on the evidence presented, that the telephone company need not share its white pages listings with a rival independent telephone directory publisher. *Id.* at 70. Judge Michael A. Telesca determined that the listing information was not an essential facility. *Id.*

FP has taken the position that the duplication of the white pages listings would be difficult and economically impractical. RTSC has

contended that the information contained in the white pages listings could be reproduced either through a house-to-house survey or through a telephone survey using digit sheets. RTSC has also pointed out that the courts in the copyright field have recognized that this information could be obtained through independent means.

The evidence concerning the essentiality of the white pages listings was not extensive. Tom Feist, the owner of FP, testified that it would not be economically feasible to reproduce the white pages listings through other means. He stated that he had no idea what it would cost to produce the white pages listings by a house-to-house survey. He further indicated that a telephone survey using digit sheets would be possible, but not practical. Fred Smykla, the executive director of the National Yellow Pages Service Association, testified that the white pages listings could not be economically generated from scratch. Dave Grandell, who has been involved in the business of producing independent telephone directories for over ten years, testified that he had attempted to compile white pages listings from scratch using digit sheets from 1978 through 1982 or 1983. He noted that he had problems finding someone to make the phone calls and getting it completed in a timely manner. He concluded that it was not economically feasible to obtain the white pages listings without access to the telephone company's listings. This constituted the sum of the evidence on the subject of the essentiality of the white pages listings.

The cases noted by RTSC from copyright law are helpful in considering this issue. In considering whether independent telephone directory publishers could use a copyrighted telephone directory produced by the telephone company, courts have indicated that the independent publisher can make fair use of the telephone company's directory if he first makes an honest, independent canvass and then merely compares and checks his own directory with that of the copyrighted publication and publishes the result after verifying the additional items derived from the copyrighted publication. *United Telephone Co. of Missouri v. Johnson Publishing Co.*, 671 F.Supp. 1514, 1522 (W.D.Mo.1987), *aff'd*, 855 F.2d 604 (8th Cir. 1988); *Central Telephone Co. of Virginia v. Johnson Publishing Co.*, 526 F.Supp. 838, 843 (D.Colo.1981); *Northwestern Bell Telephone Co. v. Bedco of Minnesota, Inc.*, 501 F.Supp. 299, 302 (D.Minn.1980); *Southwestern Bell Telephone Co. v. Nationwide Independent Directory Service, Inc.*, 371 F.Supp. 900, 906 (W.D.Ark.1974). These courts have all recognized that the independent telephone directory pub-

lisher can obtain the information contained in the white pages listings through independent research.

[4] The court is not convinced, based on the present record, that the white pages listings are an "essential facility." The information contained in the white pages listings can be independently obtained from other sources. FP was unable to point to any regulatory restrictions in obtaining the information. In addition, FP did not persuade the court that acquiring this information was either impossible or economically impractical. The evidence did demonstrate that it would require some effort and some cost. However, the evidence fell far short of that adduced in other essential facility cases. *See, e.g., Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir.1984); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C.Cir.1977), *cert, denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978). The evidence did show that one other independent telephone directory publisher had made use of digit sheets when the local telephone company refused access to the white pages listings. We further note that the copyright laws do not totally preclude the independent telephone directory publisher from using the local telephone company directory. The copyright laws require only that the independent publisher make an honest, good faith effort at obtaining the information contained in the telephone company directory prior to using that directory. This requirement, as the court views it, does not mean that the independent publisher must contact every telephone subscriber prior to using the telephone company directory. The independent publisher need only make an honest effort. The court cannot establish in this opinion what constitutes such an effort, but we can say that the requirement is not nearly as constrictive as FP would suggest. Once the independent publisher has made an honest effort at procuring this information, then he can use the telephone company directory. With the use of the telephone company directory, the independent publisher has access to the desired facility. Accordingly, we do not find that FP has sustained its burden of proof on this theory of its refusal of deal claim.

Intent

[5] A second and independent basis for imposing a § 2 antitrust liability upon RTSC for its refusal to deal would be a determination that RTSC's actions constituted sufficient evidence of an intent to monopolize. "In addition to the cases finding liability for a refusal to deal when an essential service is involved, there are cases which find liability when a monopolist's refusal to deal with a competitor is

shown to be evidence of an illegal intent to destroy competition. These cases focus on the intent and competitive effect of the refusal to deal; not on whether the facility itself is 'essential.'" *MCI Communications Corp.*, 708 F.2d at 1148 (citations omitted). The theoretical distinction between the intent theory and the essential facilities doctrine is that the former focuses on the monopolist's state of mind while the latter examines the detrimental effect on competitors. *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir.1979). However, as recognized by the Tenth Circuit in *Aspen Highlands Skiing Corp.*, there are many overlapping considerations in practice.

Once again, ordinarily, a company may deal or refuse to deal with whomever it pleases, as long as it acts independently. *Aspen Skiing Co.*, 472 U.S. at 600, 105 S.Ct. at 2856. Even a company with monopoly power in a relevant market has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such refusal. *Id.* at 604, 105 S.Ct. at 2858. It is unlawful, however, for a monopolist to engage in conduct, including refusals to deal, that unnecessarily excludes or handicaps competitors in order to maintain its monopoly into another relevant market. Exclusionary conduct is conduct that does not benefit consumers by making better products or services available, by increasing efficiency, or in other ways, but instead has the effect of impairing competition. *Id.* at 605, 105 S.Ct. at 2858.

Having carefully reviewed the sum of the evidence, we find an intent by RTSC to exclude FP in order to extend its monopoly into another relevant market. In reaching this conclusion, the court has carefully weighed the evidence presented to the court. We believe that the intent of RTSC was honestly reflected during discovery in this case. FP propounded an interrogatory to RTSC asking for the reason for RTSC's refusal to license the white pages listings to FP. RTSC responded as follows: "Compilation of white page listings is an ongoing year 'round effort of [RTSC] to be provided to its subscribers. Costs are recovered from subscribers and revenues derived from Yellow Page ads. Any profits realized from the directory are used to keep rates down. Furnishing these listings to anyone would be defeating one of the purposes of the co-op." In addition, the following occurred during a deposition of Merlin Dennis, a member of the board of directors of RTSC, after the interrogatory had been answered:

Q: You don't recall why you refused to license listings to [FP]?

A: No, not absolutely. I know it was the motion of the board to do that and I don't recall any particular discussion, no.

Q: Do you still refuse to license listings to [FP]?

A: Speaking for the board, that's their feeling. You are asking me as a spokesman for the board. Is that correct?

Q: Either that or as president of the corporation.

A: At this point we have not changed our decision.

• • • • •

Q: You have answered the interrogatory, the corporation has, stating the reason you refused to license listings to [FP] is because it would defeat your purpose. You state that your costs of compilation are recovered from subscribers and revenues derived from Yellow Page ads. What I am asking is what's the recovery of cost from the Yellow Page ads have to do with your purpose?

A: Any income that comes to the organization will affect the rates that the subscribers pay.

Q: What does that have to do with licensing the listings to [FP]?

A: Anything that will affect the operation of our Yellow Pages.

• • • • •

Q: Okay, that's the total extent of your answer, is that it is a business decision. No matter how much I ask you, you are never going to say anything about reasons, is that right?

A: Never is a long time.

Q: Would you like to have [FP] out of the area?

A: I am not going to answer that.

Q: Why don't you answer that?

A: I think the reason, the answer is obvious why I do not answer.

The aforementioned responses suggest quite clearly that RTSC did not want any competition in the yellow pages advertising market. Although the testimony at trial differed from the record established during discovery, we were not persuaded by it. Merlin Dennis testified at trial, and his memory was much clearer. He testified that he had refreshed his recollection and he now clearly remembered that RTSC had refused to license the white pages listings to FP because the RTSC board believed that its subscribers were suspicious of a new independent telephone directory and was concerned that the licensing of the white pages listing might violate the contract that RTSC had with its directory publisher. The court did not find Mr. Dennis' trial testimony credible in light of the evidence adduced during discovery. The discovery materials strongly suggest that RTSC's intent was to destroy competition. The conduct of RTSC impaired the opportunities of FP and did not further competition on the merits. RTSC's refusal to deal was exclusionary

conduct, not competitive conduct. The suggestion that the RTSC board was unwilling to license the white pages listings because subscribers were leery of an independent telephone directory was unsupported. In addition, the contention that the licensing of the white page listings to FP might have violated the contract with RTSC's directory publisher also lacks credence. A quick review of the contract would have settled this concern. The overriding interest of the RTSC board was the damage that the FP directory would do to RTSC.

This finding is further supported by the evidence indicating that RTSC was willing to license its white pages listings to non-competitors. RTSC had no problem in licensing its listings to telephone companies that did not sell advertising in the RTSC service area. This sort of discriminatory refusal to deal is unlawful. See *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951).

Accordingly, although RTSC generally may be free to deal with whomever it pleases, we find based on a review of the evidence that its real purpose was to extend its monopoly in telephone service to a monopoly in yellow pages advertising unlawfully, and conclude that its behavior constitutes an illegal refusal to deal under § 2 of the Sherman Act.

Injury

[6] The court shall next turn to the issue of injury and damages. RTSC argues that, even assuming it abused its monopoly power, FP cannot recover because it has failed to establish that RTSC's unlawful conduct caused FP injury and damages to its business.

Injury is an essential element that a plaintiff must prove to recover under the antitrust laws. *Aspen Highlands Skiing Corp.*, 738 F.2d at 1523. FP must prove antitrust injury "reflect[ing] the anticompetitive effect either of the violation or of anti competitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Proving causation does not require plaintiff to prove the value of its injury. It requires only that plaintiff prove that it was in fact injured by defendant's alleged antitrust violation. If plaintiff was in fact injured, then we must consider the amount of plaintiff's damages. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571-72 n. 9, 23 L.Ed.2d 129 (1969); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931).

The court is satisfied that FP offered evidence which established as a matter of fact and with a fair degree of certainty that RTSC's illegal conduct was a material cause of FP's injury. FP demonstrated that RTSC's refusal to license the white pages listings had an impact on its market share and its advertising rate. The evidence revealed that FP's directory was incomplete and inaccurate because of RTSC's refusal to license its white pages listings. The evidence further revealed that FP's market share in areas where the local telephone company licensed its white pages listings was significantly higher than its market share in the RTSC service area. In sum, the requirement of proof of injury as an element of plaintiff's case was met.

Damages

[7] The standards involved in proving damages in antitrust cases were set forth in *Aspen Highlands Skiing Corp.* as follows:

> The Supreme Court has recognized that an antitrust plaintiff is rarely able to prove its damages with mathematical precision. *See e.g,. J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566, 101 S.Ct. 1923, 1929, 68 L.Ed.2d 442 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation."); *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969) ("damages issue in [cases where plaintiff was partially or totally excluded from a market] are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts"); *see also King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1158 (10th Cir.1981), *cert, denied*, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 246 (10th Cir.1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977). The Court has emphasized that the trier of fact can determine the amount of damages from "a just and reasonable estimate of the damage based on relevant data." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 574, 580,90 L.Ed. 652 (1946). The damage award, however, may not be based on "speculation or conjecture." *Id.*

738 F.2d at 1525-26.

FP presented the testimony of Charles P. Goldfarb, an economist with an extensive background in antitrust matters. Mr. Goldfarb determined that the range of damages suffered by FP over the ten-year period between 1978 to 1988 was $33,000 to $58,000. Mr. Goldfarb arrived at this figure using several assumptions and several calculations. Mr. Goldfarb's calculations were performed only for the year 1987. He first assumed that FP would have gained as much of the market in the RTSC service area as it had in other areas where it had been able to license the white pages listings. This meant that FP's market share would have increased 9%. This 9% increase would have boosted earnings by $6,600. Mr. Goldfarb called this calculation a "conservative estimate." This was deemed a conservative estimate because Mr. Goldfarb assumed that the total sales in the RTSC service area would not have increased even if FP had been able to license the white pages listings. Mr. Goldfarb noted that advertisers in the RTSC service area might have purchased more advertising if they believed that the FP was producing a better product. He noted further that it assumes that FP was not harmed outside the RTSC service area as a result of the incomplete listings in the RTSC service area. He believed that the incomplete listings in the RTSC service area might have had an impact on FP's ability to sell outside the RTSC service area. He also performed a less conservative estimate which showed a gain of revenues of $11,600. This calculation reflected an increase in FP's percentage of RTSC's revenues to the percentage that FP had achieved in comparison to other local telephone companies. Mr. Goldfarb then divided these figures in half and multiplied them by five. He divided them in half and only multiplied them by five rather than ten in order to be "very conservative" in his damages estimate. He did not figure the cost of licensing the white pages listings because he noted that the cost of verification is the same or higher than the cost of the listings.

The court has carefully considered all of the testimony offered at trial as it related to the issue of damages. Having carefully reviewed that testimony, the court concludes that FP suffered damages in the amount of $33,000. We believe that this amount is a conservative one, but an appropriate one. The court found no merit to RTSC's efforts to attack Mr. Goldfarb's testimony as insufficient, incomplete or inaccurate. In reaching this conclusion, we note that once a plaintiff has proved the the fact of injury, it is allowed considerable latitude in proving the amount of damages resulting from that injury. No mechanical test or formula requires that damage proof

conform to a particular theory or model. An antitrust plaintiff has a lesser burden of proof as to damages than do plaintiffs in other types of civil actions. *See Zenith Radio Corp.*, 395 U.S. at 123, 89 S.Ct. at 1576. RTSC sought to point out that Mr. Goldfarb used only the figures from 1987 in arriving at his damages figure. RTSC contended that FP should have produced figures for each of the ten years for which it sought damages. The court was convinced that the year 1987 was a representative year and could be used to estimate the total amount of FP's damages. Mr. Goldfarb's subsequent calculations suggested that a very conservative methodology. Thus, we are unable to conclude that his final figures were based on speculation or conjecture. We note that RTSC could have made the necessary calculations if it believed that the numbers used by Mr. Goldfarb were inaccurate or not representative. RTSC also pointed out that it was a co-op company and that the market shares it obtained may have been due to loyalty by its telephone subscribers and/or the economic interests of its telephone subscribers. Mr. Goldfarb discounted this contention, and we agree with his analysis. In sum, we are convinced that the figure of $33,000 is the proper amount of FP's damages. This amount shall be trebled for a total award of $99,000.

Injunctive Relief

The court shall also grant the injunctive relief sought by FP. Injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, is granted for the purpose of preventing threatened loss or damage by reason of a violation of the federal antitrust laws. *Helfenbein v. International Industries, Inc.*, 438 F.2d 1068, 1071 (8th Cir.1971), *cert. denied*, 404 U.S. 872, 92 S.Ct. 63, 30 L.Ed.2d 115 (1971). In the framing of equitable decrees, the district courts are clothed with board discretion to model their judgements to fit the exigencies of the particular case. *See Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc.*, 414 F.2d 506, 525 n. 32 (3d Cir.1969), *cert. denied*, 396 U.S. 1009, 90 S.Ct. 567, 24 L.Ed.2d 501 (1970). The court shall enjoin RTSC from refusing to license its white pages listings at a reasonable rate. The court shall provide the parties the opportunity to reach an agreement on this rate. This agreement should be reached within thirty days of the date of this order. This matter shall be resubmitted to the court if the parties fail to reach an agreement.

Attorney's Fees

Finally, the court shall also award attorney's fees to FP. 15 U.S.C. §§ 15 and 26. The parties should make some effort to resolve this aspect of the case pursuant to the guidelines established in Local

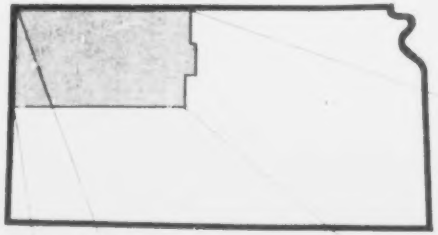
Rule 220. The issue of the amount of attorney's fees should be submitted to the court if no agreement is reached by the parties.

IT IS THEREFORE ORDERED that judgment hereby be entered in favor of Feist Publications, Inc. in the amount of $99,000.00.

IT IS FURTHER ORDERED that Rural Telephone Service Company, Inc. be hereby enjoined from refusing to license the white pages listings to Feist Publications, Inc. at a reasonable rate. The parties shall attempt to resolve the amount of this rate within thirty days of the date of this order. If no agreement is reached, the court shall determine the appropriate rate.

IT IS FURTHER ORDERED that Feist Publications, Inc. be hereby awarded its attorney's fees in litigating this action. The parties should make some effort to resolve this issue in accordance with Local Rule 220. The issue should be submitted to the court if no agreement is reached by the parties.

IT IS SO ORDERED.



Northwest Kansas Area Telephone Company Coverage

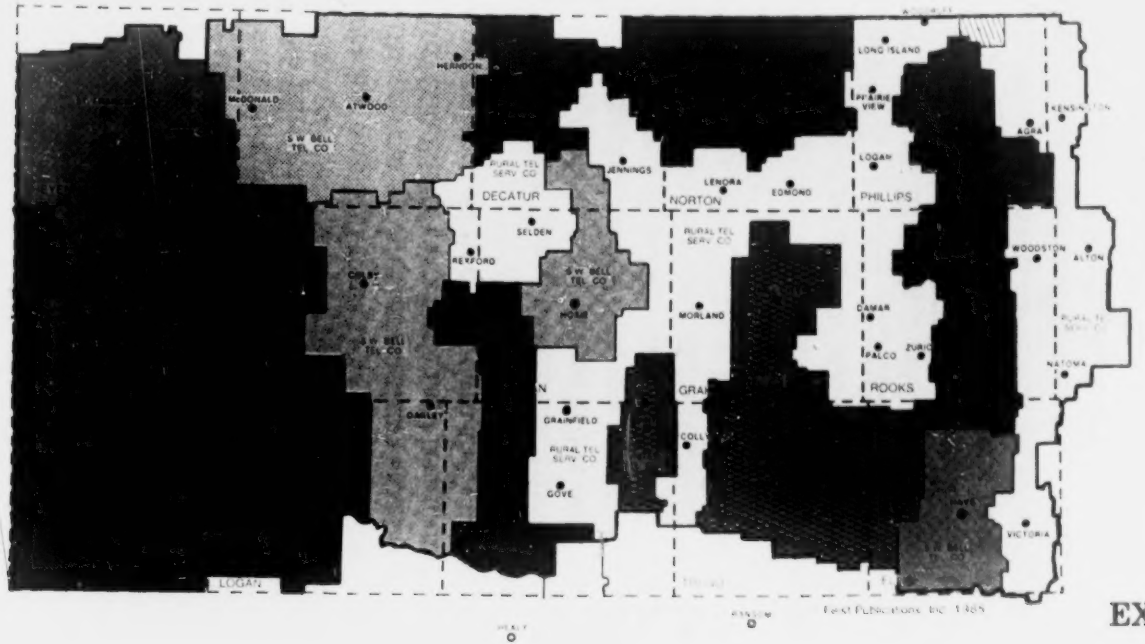


EXHIBIT K-1

30a

BEST AVAILABLE COPY

Rural Telephone Service Co., Inc.

v.

Feist Publications, Inc.

U.S. District Court, District of Kansas. Case No. 83-4086-R.

Filed July 9, 1990.

For plaintiff: James M. Caplinger, Jr., Topeka, Kan.

For defendant: Kyler Knobbe,

of Ridenour and Knobbe, Cimarron, Kan.

Memorandum and Order

ROGERS, D.J.:

Introduction

On April 5, 1990, the court entered judgment in favor of Feist Publications, Inc. (Feist) in its antitrust action against Rural Telephone Service Company, Inc. (RTSC). The court found that RTSC's refusal to license white pages listings to Feist constituted an illegal refusal to deal under § 2 of the Sherman Act. The court found an intent by RTSC to exclude Feist in order to extend its monopoly in telephone service into yellow pages advertising. In reaching this conclusion, the court found that Feist had successfully demonstrated that RTSC had monopoly power in the relevant product market and the relevant geographic market. This matter is presently before the court upon RTSC's motion for reconsideration. RTSC contends that the court erred in finding that the relevant geographic market was its service area. RTSC argues that the record shows that the court reached this conclusion based on several erroneous facts.

Background

Before addressing the arguments of the parties in more detail, we shall provide some background. In order to prevail on a claim under § 2 of the Sherman Act, a plaintiff must demonstrate that the defendant has monopoly power in the relevant market (monopolization) or that the defendant has a specific intent to monopolize a relevant market (attempted monopolization). The key issue in this case was determining the relevant geographic market. The relevant geographic market is the area in which RTSC faces competition from suppliers of competing products that are in the relevant product market (yellow pages advertising), and to which a buyer can practically turn for the product. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 269 n. 1 (1973); *Tampa Electric Co. v. Nashville Coal Co.* 365 U.S. 320, 327-28 (1961). Feist contended that the relevant geographic market in this case was the RTSC service area, and their evidence was designed to show monopoly power in that particular

area. RTSC contended that the relevant geographic market extended beyond the expanse of its service area and included the trade centers of Colby, Hays, Phillipsburg and others, and that there was no evidence that it exercised monopoly powers in this broadened geographic market.

The court concluded that the evidence established that the RTSC service area was the relevant geographic area in this case. In our findings of fact, we found that RTSC did not distribute its directory outside of its service area. We then applied the following analysis in concluding that RTSC service area was the relevant geographic area:

> This is the area where RTSC and FP [Feist Publications, Inc.] effectively compete. It is in this area that the consumer has two choices for purchasing yellow pages advertising that reaches the local community and the regional communities. The area suggested by RTSC is not the area of effective competition. It is true that RTSC and FP do compete in those areas. The RTSC directory, however, is not a legitimate substitute for the FP directory in areas outside the RTSC service area because the RTSC directory is not distributed in those areas. Thus, an advertiser in the areas outside the RTSC service area does not view the RTSC directory and FP directory as substitutes for each other because the RTSC directory is not useful in that advertiser's local community. This advertiser has three choices: the FP directory, the RTSC directory, and his local telephone company directory which may or may not be a regional directory. For purposes of advertising his business locally and to other areas, the advertiser is restricted to advertising in the FP directory and his local telephone company directory if it is also a regional directory. The RTSC directory is not a valid substitute for either of these directories because the advertising will not be seen by the local community since the directory is not distributed there. Accordingly, the only area of effective competition here is the RTSC service area. This is the area where advertisers have choices of two similar products.

RTSC's Motion

In the instant motion, RTSC contends that the evidence at trial demonstrated that the RTSC directory was distributed beyond the RTSC service area. Relying upon their 1987 telephone directory

(exhibit A-1), RTSC points out that their telephone directory was distributed beyond their service area into Hill City and Norton. RTSC then argues that its directory is a legitimate substitute for the Feist directory in these areas outside the RTSC service area. RTSC asserts that a reevaluation of the correct geographic area would produce markedly different figures on RTSC's monopoly power in relevant geographic market. RTSC points out that in the correct geographic market, Feist would have a market share of 35.9% and RTSC would have a market share of 61.5%. These figures, RTSC asserts, show that Feist has a greater market share in this geographic market than in the other 19 Kansas markets used as a comparison to establish damages. Thus, RTSC argues that it did not have monopoly power in the relevant market of yellow pages advertising. Further, RTSC contends that the damage estimates provided by Feist's expert are now inaccurate and nothing more than mere speculation and conjecture.

Feist's Response

In response, Feist argues that the evidence supports the finding that the RTSC directory was only distributed in the RTSC service area, and that any distribution in Hill City and Norton was "cursory or superficial at best." Feist points to several pieces of evidence which supports the court's finding. Feist also notes a RTSC advertisement that appeared in the *Hill City Times* on June 2, 1988 announcing an expanded distribution of the 1988 RTSC directory into the towns of Norton, Hill City, Hoxie, Plainville, Smith Center, Oberlin, Phillipsburg and Stockton.

Discussion

The court has again carefully reviewed the evidence presented at trial. Based upon that review, the court finds no merit to the arguments raised by RTSC. We must conclude that the 1987 RTSC directory was not distributed outside of the RTSC service area.

Charles Goldfarb, Feist's expert, testified that RTSC has "a small amount of distribution beyond its service area," but that it was not "really relevant to the analysis." Merlin Dennis, the President of RTSC, testified that Rural Telephone's directory was distributed in its service area plus Hill City and Norton. However, he further testified as follows: "The book isn't distributed to every person. It is distributed in the green area [the area outside Rural's service area] to all of those who sell, who take yellow page advertising in our directory, and also on a limited basis in some of those towns." At oral argument, counsel for RTSC called Dennis' testimony ambiguous

and attempted to discredit his testimony because he was not involved in the day-to-day operation of RTSC. We do not find either argument persuasive. The testimony offered by Dennis was the only testimony offered by a RTSC official on this issue. President Dennis' testimony appeared to be supported by the other testimony in the record. For example, the National Yellow Pages Service Association Rates and Data book does not reflect the wide distribution of the RTSC directory suggested by counsel for RTSC. In 1983, the NYPSA book showed that RTSC distributed 13,000 directories. RTSC's 1983 directory indicated that distribution was limited to the RTSC service area. In 1986, the NYPSA book showed that RTSC again distributed 13,000 directories. However, the 1986 RTSC directory indicated that the directory was distributed in its service area plus Hill City and Norton. In 1987, the NYPSA book shows that RTSC distributed 15,000 directories. Thus, the distribution rates shown in the NYPSA book fail to reflect any increase for the addition of Hill City and Norton in 1986 and only an increase of 2,000 in 1987. The modest increase of 2,000 is peculiar considering that Hill City and Norton have a combined population of approximately 9,000. Furthermore, Feist has indicated that in 1987 it delivered 1,618 directories to Hill City and 2,821 directories to Norton.

The 1987 RTSC directory did indicate on its cover that the directory was distributed in Hill City and Norton. However, the court found the reliability of the information contained on and in the RTSC directories suspect. For example, the 1988 RTSC directory indicates on its cover that it was not distributed in Stockton and Wakeeney, but a table on page two of the directory indicates that it was distributed in Stockton and Wakeeney.

Conclusion

In sum, the court finds that the evidence supports the findings we made in our earlier order. The evidence simply does not support RTSC's contention that its directory was distributed in Hill City and Norton in 1987. Rather, the facts suggest that the directory was provided only to individuals who purchased yellow pages advertising in those areas. Thus, the distribution of the RTSC directory in those areas was very limited. This limited distribution has no impact on our decision concerning the relevant geographic market. The court continues to believe that we correctly determined the relevant geographic area in this case based upon the evidence presented at trial. Accordingly, RTSC's motion for reconsideration shall be denied.

It Is So Ordered.

FILED
OCT 23 1992
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No. 91-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FEIST PUBLICATIONS, INC.

Petitioner,

v.

RURAL TELEPHONE SERVICE COMPANY, INC.

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that respondent's decision against cooperating with petitioner did not harm competition and that petitioner therefore failed to prove its claim under § 2 of the Sherman Act.

PARTIES TO THIS PROCEEDING

The caption of the case in this Court contains the names of all parties. Respondent Rural Telephone Service Company, Inc. is a Kansas cooperative owned by its subscriber-owners.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Rural Telephone Service Company, Inc. ("Rural") respectfully submits this brief in opposition to the petition for writ of certiorari filed by petitioner Feist Publications, Inc. ("Feist" or "petitioner").

OPINIONS BELOW

Rural agrees with petitioner's statement of the opinions below except that the district court's denial of Rural's motion for reconsideration (Petitioner's Appendix ("Pet. App.") 31a-34a) is found at 1990-2 Trade Cas. (CCH) ¶ 69,236 (D. Kan. 1990).

JURISDICTION

The Court of Appeals entered judgment on February 19, 1992. Feist filed its certiorari petition on May 18, 1992, and on September 23, 1992, the Court requested that Rural file a response on or before October 23, 1992. Feist has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Rural is a non-profit cooperative telephone company owned by its 4700 subscribers in northwest Kansas. Pet. App. 7a. Rural was formed as a result of the need to provide telephone service in an area that had none. As one of Rural's employees testified at trial about Rural's beginnings:

> [Y]ou are looking at an area that no one else in the State of Kansas or in the country wanted to provide service to. . . . These people . . . had no telephone service, so a group of farmers and individuals got together, and said what can we do to resolve this situation. They created the Rural Telephone Service Corporation, went door to door begging for people to sign up, getting [a] $30.00 fee wherever they could to start a fund so they could go to the bank and try to borrow, get telephone service started. They went for several years without turning a profit, and just gradually expanded where they could.

Trial Transcript ("Tr.") Vol. III at 161-62.

The Kansas Corporation Commission (the "KCC") regulates Rural's provision of telephone service in several important respects. First, the KCC sets the

rates Rural may charge for telephone service. Kan. Stat. Ann. §§ 66-128 (1990). Second, the KCC requires Rural to rebate to its subscriber-owners all revenue Rural receives that exceeds Rural's cost of doing business. Pet. App. 6a n.8, 7a; Tr. Vol. III at 108, 171-72, 205. Third, the KCC requires Rural to provide an annual telephone directory to Rural's subscriber-owners. Pet. App. 8a. Rural's directory consists of yellow pages advertising and white pages listings, which list the subscriber-owners' names, addresses and telephone numbers. *Id.*

Because the KCC sets Rural's service rates based upon Rural's total revenue, Rural's sale of yellow pages advertising lowers the service rates that Rural's subscriber-owners pay. Tr. Vol. I at 35-36. Rural's ability to sell yellow pages advertising thus has a direct effect on the prices Rural's subscriber-owners pay for telephone service.

Feist is a privately held, for-profit Kansas corporation that distributes telephone directories. Pet. App. 8a. Feist, like Rural, sells yellow pages advertising. *Id.* In 1978, Feist approached Rural and asked to purchase Rural's copyrighted white pages listings at a price of ten cents per listing (approximately $470.00 total). Pet. App. 9a; Tr. Vol. I at 29-31. Rural's board of directors met and considered the proposal but decided not to accept Feist's offer at that time. Pet. App. 9a; Tr. Vol. III at 191-92.

The district court found that Rural's decision was based upon the concern that sharing its listings with Feist would cause Rural to lose yellow pages advertising revenue. Pet. App. 23a-24a; Tr. Vol. I at 35-36. Given the KCC's regulatory scheme, such a reduction in Rural's yellow pages advertising revenue

necessarily would have resulted in an increase in the rates Rural's subscriber-owners would have had to pay for telephone service. Tr. Vol. I at 35-36.

After Rural's directors tabled Feist's request, Feist simply copied Rural's white pages listings from Rural's published directory. Tr. Vol. II at 35-36. Shortly thereafter, in the fall of 1978, Feist launched its northwest Kansas telephone directory in competition with Rural's directory. *Id.* Prior to 1983, when Rural sued Feist for copyright infringement, Feist never complained to Rural about Rural's decision not to share its listings, nor did Feist ever mention a possible antitrust claim against Rural. Tr. Vol. II at 29-30, 43; Vol. III at 192-93.

In each year during 1978-1987, the time period addressed at trial, Feist distributed its northwest Kansas directory in competition with Rural's directory. Tr. Vol. II at 4. Feist's share of yellow pages advertising sold to merchants within Rural's service area (the relevant market defined by the district court) rose from zero to twenty percent. Pet. App. 11a (table). Significantly, Feist achieved its success while charging higher prices than Rural, as the following table demonstrates:

Price Per Quarter Column Ad

Directory Year	Feist ($)	Rural ($)
1978	n/a	108.00
1979	200.00	126.00
1980	200.00	135.00
1981	200.00	165.00
1982	200.00	181.80
1983	275.00	218.40
1984	275.00	246.60
1985	275.00	276.00
1986	324.00	303.00
1987	324.00	333.60

Ex. U-1. In addition, ninety-five percent of the respondents to a survey Feist commissioned in 1982 were aware of and had a copy of Feist's directory. Ex. 18; Tr. Vol. I at 54-56. Many of the survey respondents used Feist's directory considerably more often than they used the local telephone company's directory. *Id.*

Despite its success, Feist claimed at trial that access to Rural's listings was "essential" to Feist's ability to sell yellow pages advertising. The district court found that Feist's evidence did not substantiate this claim:

> FP [Feist] was unable to identify *anyone* who had refused to purchase yellow pages advertising in its directory because the FP northwest directory did not contain complete listings from the RTSC [Rural] service area.

> FP was also unable to identify *anyone* who had complained that the FP northwest directory was incomplete.
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> * * * *
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> The information contained in [Rural's] listings can be independently obtained from other sources. FP was unable to point to any regulatory restrictions in obtaining the information. In addition, FP did not persuade the court that acquiring this information was either impossible or economically impractical.

Pet. App. 11a, 22a (emphasis added). *See also* Tr. Vol. II at 52 (Feist's president could not identify a single merchant who refused to purchase an ad in Feist's directory); Tr. Vol. II at 93 (same); Tr. Vol. III at 15-16 (same).

This litigation began in 1983, when Rural sued Feist for copyright infringement. *See Feist Publications, Inc. v. Rural Telephone Service Co.*, ___ U.S. ___ , 111 S.Ct. 40 (1990). Feist responded to Rural's copyright claim by filing a counterclaim asserting that Rural's decision, five years earlier in 1978, not to share its white pages listings with Feist violated § 2 of the Sherman Act.

On April 5, 1990, following a brief bench trial conducted in 1988, the district court entered judgment against Rural on Feist's counterclaim. *Rural Telephone Service Co. v. Feist Publications, Inc.*, 737 F. Supp. 610 (D. Kan. 1990). Pet. App. 7a-30a. The district court subsequently denied Rural's motion for reconsideration. *Rural Telephone Service Co. v. Feist Publications, Inc.*, 1990-2 Trade Cas. (CCH) ¶ 69,236 (D. Kan. 1990). Pet. App. 31a-34a.

On February 19, 1992, the Court of Appeals reversed the district court's judgment for Feist, on the ground that Rural's decision not to share its white pages listings with Feist was lawful. *Rural Telephone Service Co. v. Feist Publications, Inc.*, 957 F.2d 765 (10th Cir. 1992). Pet. App. 1a-6a. The court expressly held that Rural did not violate § 2 because Feist "failed to prove Rural Telephone's refusal to deal had anti-competitive effects. . . ." Pet. App. 4a; *see also id.* 6a ("Because Feist Publications has failed to prove harm to competition, its antitrust claim must fail.").

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision rejecting petitioner's antitrust claim for failure to prove harm to competition is consistent with this Court's decisions and the decisions of all other circuits. The certiorari petition raises only fact-bound questions, not worthy of this Court's attention, regarding the Court of Appeals' application of a long-standing antitrust principle to evaluate Rural's decision not to share its white pages listings with Feist. Moreover, the issue presented in the petition would have no effect on the outcome of this case because there are several additional grounds for overturning the district court's decision, which the Court of Appeals did not reach due to its holding on the harm-to-competition issue. The Court therefore should deny the petition.

A. The Court Of Appeals' Decision Properly Followed This Court's Pronouncements Requiring Proof Of Harm To Competition In Antitrust Litigation.

Petitioner first contends that the Court of Appeals' holding conflicts with this Court's decisions in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), and

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). However, the decision below both relied on and scrupulously followed both *Grinnell* and *Aspen Skiing*, and adhered to the long line of cases holding that harm to competition must be established in order to sustain a claim under the antitrust laws. Pet. App. 3a-4a, 5a.

For four decades this Court consistently has held that the antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Cargill v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) ("*ARCO*"). As recognized by the Court in *Aspen Skiing*, there is no exception to this requirement for § 2 claims. *See* 472 U.S. at 605.

The Court of Appeals quoted and relied on this Court's articulation in *Grinnell* of the elements of a § 2 claim. Pet. App. 3a-4a. In *Grinnell*, this Court explained that "[t]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." 384 U.S. at 570-71. Petitioner concedes that the Court in *Aspen Skiing* interpreted the *Grinnell* test to require proof that " '[the refusal] has impaired competition in an unnecessarily restrictive way.' " Pet. at 6 (quoting *Aspen Skiing*, 472 U.S. at 605). Petitioner's only complaint is that the Court of Appeals erred when it applied this standard to the

facts of this case and held that "Feist Publications has failed to prove harm to competition," and that therefore "its antitrust claim must fail." Pet. App. at 6a.

As the Court of Appeals observed, the district court "did not make a specific finding of harm to competition." Pet. App. 4a-5a. The district court did find, however, that Feist "was unable to identify anyone who had refused to purchase yellow pages advertising in its directory because the [Feist] northwest directory did not contain complete listings from [Rural's] service area." Pet. App. 11a. Feist "also was unable to identify anyone who had complained that [Feist's] northwest directory was incomplete." *Id.* The Court of Appeals also noted:

> Feist Publications offered no proof competition in the yellow pages advertising market was reduced as a result of Rural Telephone's actions. Between 1978 and 1987, Feist Publications' market share rose from zero to twenty percent. Further, during the same years, the price for a quarter column ad remained competitive, with Feist Publications generally charging substantially more than Rural Telephone. Finally, due to different publication dates, Feist Publications' directory often contained listings not available in Rural Telephone's directory.

Pet. App. 6a.

Thus, rather than showing harm to competition, the evidence below proved that Rural's decision not to cooperate with Feist increased competition, to the benefit of directory advertisers and consumers. Ap-

plying the principles set out in *Grinnell* and *Aspen Skiing*, the Court of Appeals correctly determined Feist's lack of proof of harm to competition to be "fatal" to Feist's case. Pet. App. 6a. As this Court explained in *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975), "The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors."

Petitioner seeks to avoid its failure to prove harm to competition by asserting that the Tenth Circuit somehow "added an additional requirement of specific proof of 'harm to competition' to the burden Feist must carry to establish its cause herein." Pet. at 5. There are two fatal flaws in this argument.

First, as discussed above, this Court's *Brown Shoe*, *Brunswick*, *Cargill*, *ARCO*, *Grinnell* and *Aspen Skiing* decisions, not just the decision below, required petitioner to prove harm to competition. The Court of Appeals' decision did not create any new standard for antitrust analysis. The court merely applied a basic antitrust principle to the undisputed facts of this case and found Feist's proof wanting. As the Court of Appeals did not announce any new principle of law, but instead merely applied a principle announced long ago by this Court, Feist's petition does not merit this Court's review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* 223 (Sixth ed. 1986) ("Certainly, to the extent that

a 'correct' decision is a restatement of 'settled law,' review on certiorari becomes patently inappropriate.").

Second, petitioner's argument that the Tenth Circuit "added an additional requirement" to petitioner's burden of proof is belied by the Court of Appeals' decision. The Court of Appeals did not engraft a new element onto § 2. Instead, the court examined the record for evidence of harm to competition "[i]n determining" whether Rural "acted lawfully or in violation of § 2." Pet. App. 3a. The Tenth Circuit properly held that Rural's "conduct" was lawful and did not violate § 2 because Rural's conduct did not harm competition. Petitioner's assertion that the Tenth Circuit has changed the elements of a § 2 claim is thus premised upon a mischaracterization of the actual basis and rationale of the Court of Appeals' decision and does not merit this Court's review.

B. The Court Of Appeals' Decision Does Not Conflict With Any Other Circuit Decision.

Petitioner asserts that "[o]ther Circuits have held that additional proof of competitive harm is not necessary in a case where the traditional elements of monopolization have been found." Pet. at 7. This argument misses the point. The Tenth Circuit held that Rural's decision not to share its white pages listings with Feist was lawful conduct, not anticompetitive conduct, because it did not harm competition. This holding is perfectly consistent with the holdings of other circuits.

The first of the only two cases cited by petitioner in support of its assertion that there is a conflict among the circuits, *Walker v. U-Haul Co. of Missis-*

sippi, 734 F.2d 1068 (5th Cir. 1984), does not contradict the decision below. While the Fifth Circuit's decision in *Walker* preceded this Court's decision in *Aspen Skiing*, which made clear that plaintiffs in § 2 cases must prove injury to competition, the *Walker* court expressly recognized that proof of "*injury to competition . . . is essential* to antitrust recovery: . . . the existence of injury is a component of the substantive right." *Id.* at 1073 (emphasis added).

Cases abound from other circuits articulating this fundamental principle. *See, e.g., Twin Laboratories v. Weider Health Fitness*, 900 F.2d 566, 569 (2d Cir. 1990) (there is no § 2 violation "if the plaintiff cannot allege harm to competition"); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 10 (1st Cir. 1987) (" 'Anticompetitive' also has a special meaning: it refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process"; holding that the plaintiff failed to prove "injury to the competitive process necessary to show a violation of Sherman Act § 2"); *Ralph C. Wilson Industries v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1363 (9th Cir. 1986) ("We have held that 'it is injury to the market, not to individual firms, that is significant' "); *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1579 n.8 (11th Cir. 1985) ("Harm to competition is a necessary element of all private antitrust suits under Sections 1 and 2 of the Sherman Act").

The only other circuit decision cited by petitioner as potentially conflicting with the decision below is *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986). Pet. at 7-8. But petitioner does not argue that there is an actual conflict between the Court of

Appeals' holding below and *Fishman*. Instead, petitioner speculates that the Court of Appeals "[p]erhaps" was relying on a theory that would conflict with *Fishman*. Pet. at 7. The problem with this argument is that it distorts both the Tenth Circuit's holding here and the Seventh's Circuit's holding in *Fishman*.

The Tenth Circuit in this case held that petitioner failed to prove harm to competition in selling yellow pages advertising, which was a necessary element of petitioner's § 2 claim. Pet. App. 4a-6a. *Fishman* did not, as petitioner suggests, hold that a § 2 plaintiff need not satisfy the harm-to-competition requirement. In fact, the *Fishman* court came to precisely the opposite conclusion, observing that "the antitrust laws seek to protect competition" and holding that a plaintiff in a § 2 case therefore must prove "injury to competition." 807 F.2d at 536.

Moreover, the Seventh Circuit in *Fishman* actually found that the defendant's conduct not only resulted in "harm" to competition but the complete "destruction" of it. *Id.* While the court also noted that the "precise impact of defendant's conduct on the broad consuming public . . . remained unfocused," *id.* at 538, that is simply irrelevant to the question presented here. The *Fishman* court's holding that there theoretically could be harm to competition without proof of harm to consumers is not at all inconsistent with the Tenth Circuit's holding below, which found that Rural's conduct harmed neither competition nor consumers.

C. Regardless Of The Arguments Made In The Petition, The Outcome of This Case Would Be The Same, Making Review In This Court Inappropriate.

Even assuming petitioner's arguments had some merit, which they do not, the district court's judgment for petitioner would have to be reversed on grounds the Court of Appeals expressly declined to decide, namely that the district court's market definition and resulting findings of monopoly power, injury and damages all were clearly erroneous. *See* Pet. App. 2a. Thus, review of the petition would be academic. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (review should be limited to those legal issues that are "beyond the academic or the episodic").

Rural sells yellow pages advertising to merchants who wish to place yellow pages ads in Rural's directory. The majority of Rural's yellow pages advertising revenue comes from merchants located outside Rural's service area, typically merchants in towns that border on Rural's service area.[1] Despite this evidence, the district court erroneously limited the relevant geographic market to the sale of yellow pages advertising to merchants physically located within Rural's service area. Pet. App. 15a-16a. This clearly erroneous market definition, in turn, led the district court to make clearly erroneous findings of monopoly power and injury.[2] Consequently, the outcome of this case would

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[1] *See* Exs. DD, HH, WW, YY, ZZ; Tr. Vol. III at 174-75; Tr. Vol. II at 62.

[2] The district court's flawed definition of the relevant market, if accepted, also would deprive this Court of subject matter jurisdiction. In defining the market, the district court found that

not change even assuming Feist's petition had some merit. Under such circumstances, review by this Court is unwarranted.

CONCLUSION

The Tenth Circuit's decision is consistent with this Court's decisions requiring proof of harm to competition in antitrust cases. Nor is there any conflict among the circuits on this point. Finally, the judgment for petitioner is reversible on numerous grounds not reached by the Court of Appeals. This case therefore does not raise any issue for this Court to review.

Respectfully submitted,

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Rural and Feist, two Kansas corporations, compete for the sale of yellow pages advertising only to merchants physically located within Rural's telephone service area, which is wholly within the State of Kansas. Thus, according to the district court, Feist's antitrust claim under § 2 involved only intrastate conduct by Rural and only intrastate competition between Rural and Feist. The district court's market definition was so exceedingly and unreasonably narrow that it would eliminate any nexus between this case and interstate commerce, thus eliminating subject matter jurisdiction in this Court.